shows *prima facie* that the return is adequate, the basis for its public control would seem unquestionably sound.

The Towers case seems to draw a further distinction, namely, that the railroad had already started the practice of issuing commutation tickets, whereas in the Smith case there was no proof of prior issuance of mileage. But in the Smith case the Court said: "It is no answer to the objection to this legislation, to say that the company has voluntarily sold thousand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature."[15] If this statement was intended to prohibit mere regulation, as well as to deny the power to require the new type of service, it would seem to be at least questioned if not entirely overruled. The only valid objection to the statute in the Smith case was that it required the company to furnish a sort of service which it was under no duty to furnish. On this ground the case might be sustained despite the Towers decision, for there would seem to be the basis for a sound distinction between commutation tickets and mileage books. It is probable, however, that the opinion in the instant case indicates a change in political thought and that, with the Supreme Court's more liberal attitude towards regulatory legislation, a statute requiring the issuance of mileage would be upheld to-day.

DEFENSES OF A SURETY BASED UPON THE NON-LIABILITY OF THE PRINCIPAL DEBTOR.—An obligation which will place the one assuming it in the position of a surety, provided the other requisites of the relation of suretyship are present, may result from the making of a promise of any content whatever. But the more common of such promises are of three types.[1] The first is a promise by *A* jointly, or jointly and severally, with *B* to *C*, to do some act. The second is a separate promise by *A* to *C* to do some act if *B* does not.[2] The third is a promise by *A* to *C* to answer for the debt, default or miscarriage of *B*.

A, in these cases, if his promise is obligatory, will be a surety if there is a primary obligation, intended to be secured, owing from *B*, the principal, to *C*. But *A's* obligation to perform his promise depends upon the normal principles of contract law and the fourth section of the Statute of Frauds, and not upon whether he will be a surety if he is bound.[3] This position is fully borne out by the decisions of the

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[15]Lake Shore, *etc.* Ry. *v* Smith, *supra*, footnote 1, at p. 697.

[1]In order to avoid repetition it has been thought advisable to refer to the one who assumes an obligation which may be that of a surety as *A*, to the one to whom this obligation is owing as *C*, and to the one who would be in the position of a principal if *A* was a surety, as *B*.

[2]A promise of the second type differs from one of the first type in that it is a separate promise conditioned upon the failure of *B* to do some act, while the latter is a joint, or joint and several, promise with *B*; and it differs from the third type in that it makes no reference to a promise or obligation from *B* to *C*, while a promise of the third type is one to answer for a promise or obligation from *B* to *C*.

[3]The two questions, the one as to whether *A* is bound upon his promise, the other, as to whether he is a surety, do not appear, always, to have been distinguished. See 13 Columbia Law Rev. 426; 1 Brandt, Suretyship and Guaranty (3rd ed.) 163; Childs, Suretyship and Guaranty, § 129. In fact, it is generally said that the liability of the surety is measured by

courts, although their opinions contain some confusing *dicta*. Thus, when *C* sues *A* upon his promise, an answer made by *A* that *B* had never made a promise to *C*,[4] or that *B's* promise resulted in no obligation, or an imperfect one, because of *B's* personal incapacity by reason of coveture,[5] infancy,[6] lunacy,[7] or the act being *ultra vires*,[8] has been held to be no defense. Similarly, it is no defense to *A* that *B* had a right to avoid his obligation because of fraud[9] or duress[10] practiced upon him by *C*.[11] In the recent case of *Ettlinger* v. *National Surety*

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that of the principal. The cases holding that a party who has promised in one of the manners described in the text is liable despite the absence of any liability on the part of the principal are noted as exceptions "where the defense of the principal is personal".

[4]Lakeman *v.* Mountstephen (1874) 7 Engl. & Ir. App. 17. It would seem that the same principle is involved where *A* thought that two principals were obligated and, in fact, only one was bound. In this case *A* is generally liable. Stewart *v.* Behm (Pa. 1834) 2 Watts 356; Pelzer *v.* Campbell (1880) 15 S. C. 581; McLaughlin *v.* McGovern (N. Y. 1861) 31 Barb. 208; Dickerman *v.* Bowman (1861) 14 Wis. 388; *contra*, Russell *v.* Annable (1870) 109 Mass. 72. The dissenting opinion of Wells, *J.*, in the last mentioned case, gives a forcible presentation of what would seem to be the correct view of the law.

[5]Kimball *v.* Newell (N. Y. 1845) 7 Hill 116; Jones *v.* Crosthwaite (1864) 17 Iowa 394; Winn *v.* Sanford (1887) 145 Mass. 302, 14 N. E. 119; Davis *v.* Staats (1873) 43 Ind. 103; St. Albans Bank *v.* Dillon (1857) 30 Vt. 122; Wagoner *v.* Watts (1882) 44 N. J. L. 126.

[6]Parker *v.* Baker (N. Y. 1839) Clarke Ch. 136; Wauthier *v.* Wilson (1911) 27 T. L. Rep. 582; *cf.*, Kuns's Exec. *v.* Young (1859) 34 Pa. 60. It has been held that if *B*, the infant principal, disaffirms his contract and returns the consideration received, *A* is not obligated, on the ground, apparently, of a failure of the consideration for his promise, *i. e.*, the giving of a consideration to *B* by *C*. Baker *v.* Kennett (1873) 54 Mo. 82; Keokuk State Bank *v.* Hall (1898) 106 Iowa 540, 76 N. W. 832. It is submitted that a sounder conclusion was reached in Kyger *v.* Sipe (1892) 89 Va. 507, 16 S. E. 627, where *A* was held liable for the debt of *B*, the infant, less the value of the property returned to *C* by *B* upon disaffirmance.

[7]Lee *v.* Yandell (1887) 69 Tex. 34, 6 S. W. 665; *cf.*, Caldwell *v.* Ruddy (1881) 2 Idaho 1, 1 Pac. 339, where the court put their decision upon the ground that *A* impliedly promised that *B* was capable of contracting; but *cf.*, Glove *v.* Johnson (1888) L. R. 24 Ir. 352.

[8]Yorkshire Ry. & Wagon Co. *v.* Maclure (1881) 19 Ch. D. 478; Mitchell *v.* Hydraulic Bldg. Stone Co. (Tex. 1910) 129 S. W. 148, not officially reported; State *v.* Bullard (1875) 72 N. C. 441; Mason *v.* Nichols (1867) 22 Wis. *376.

[9]Walker *v.* Gilbert (1846) 15 Miss. 456; Elliot *v.* Brady (1908) 192 N. Y. 221, 85 N. E. 69; Henry *v.* Daley (N. Y. 1879) 17 Hun 210; but see Whitcomb *v.* Shultz (C. C. A. 1915) 223 Fed. 268.

[10]Plummer *v.* People (1855) 16 Ill. 358; Hazard *v.* Griswold (C. C. 1884) 21 Fed. 178; Huscombe *v.* Standing (1607) Cro. Jac. 187; Mantel *v.* Gibbs (1609) Brownlow 64; Oak *v.* Dustin (1887) 79 Me. 23, 7 Atl. 815; Robinson *v.* Gould (1853) 65 Mass. 55; *cf.*, Bowman *v.* Hiller (1881) 130 Mass. 153. The cases where a close relationship exists between *A* and *B* must be distinguished. In these cases *A* is released, not because of duress practiced upon *B*, but because, by the threatening of harm to *B*, duress is actually committed upon *A*. Osborn *v.* Robbins (1867) 36 N. Y. 365; Harris *v.* Carmody (1881) 131 Mass. 51.

[11]An analogous class of cases is that in which it is held that *A* has no defense against *C* since the latter has no remedy against *B*, either because of the Statute of Frauds, Backus *v.* Feeks (1913) 71 Wash. 508,

Co. (1917) 217 N. Y. 467, 117 N. E. 945, the defendant, a surety company, gave to the plaintiff a bond, apparently executed jointly with one Kruger,[12] providing that it would pay, in a certain event, the amount involved in an action brought against Kruger. When sued upon the bond, the defendant interposed the defense that Kruger's execution of the bond was induced by the fraud of the plaintiff. It was held, in accordance with the prevailing view, that the fraud upon Kruger was no defense to the defendant surety company.

Although *A* has no defense in a suit upon his promise merely by reason of the absence of an obligation on the part of *B*, yet the non-existence of such an obligation may be one of the facts giving rise to a number of possible defenses. *A* might have made a promise that was expressly conditioned upon the existence of a right by *C* against *B*. If that were the case, certainly the surety would have a good defense if no such obligation existed. It seems clear, however, that no such condition is expressed in what we have classified as a promise of the first type[13] where *A* promises jointly with *B*, or in our second type[14] where *A* promises to do some act if *B* does not. In our third type, however, *A* promises to answer for the debt, default or miscarriage of *B*. Whether, in this case, the existence of a debt from *B* to *C* is a condition of *A's* obligation to *C* depends wholly upon the meaning of the language expressing *A's* promise. This in turn depends upon the context, *viz.*, the circumstances accompanying the use of the language. In most instances, *A's* promise will be found to assume the existence of a relation between *B* and *C* under which *B* is expected to perform an act for *C*, rather than a legal obligation owing from *B* to *C*; and the condition of *A's* promise will be found to be a non-performance by *B*, rather than a legal default. Thus, where it appeared that the parties had in mind a particular promise made by *B*, the fulfillment of which was guaranteed by *A*, *A* was held liable although *B*, by reason of her coveture, incurred no obligation.[15] Again, where the parties had in mind a particular writing which they thought obligated *B*, it was held that, even though *B* was not in fact bound, a guarantee of the writing was equivalent to a promise that the amount mentioned therein would be paid to *C*.[16]

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129 Pac. 86; see Church *v.* Swanson (1901) 100 Ill. App. 39; see 13 Columbia Law Rev. 426, or the Statute of Limitations, Minter *v.* Branch Bank (1853) 23 Ala. 762; Whiting *v.* Clark (1881) 17 Cal. 407; Wagoner *v.* Watts, *supra*, footnote 5; *contra*, Mulvane *v.* Sedgley (1901) 63 Kan. 105, 64 Pac. 1038; Auchampaugh *v.* Schmidt (1886) 70 Iowa 642, 27 N. W. 805, or a failure to comply with the recording acts. Waterson *v.* Owens River Canal Co. (1914) 25 Cal. App. 247, 143 Pac. 90.

[12]The fact that Kruger joined in the bond does not appear in the report. It is believed, however, that he did join, as nothing to the contrary appears, and as it is only on that assumption that the question to which the court addressed itself would have been raised. It will be seen that, if Kruger had not joined, the obligation of the surety company could only have been intended to secure the obligation of Kruger in the original action, and no fraud is alleged by the surety company in the securing of that obligation. Upon the assumption that Kruger did not join, the case would be one where *B*, induced by *C's* fraud, without fraud upon *A*, procured him to obligate himself to *C*. Certainly in such a case *A* has no defense.

[13]Weare *v.* Sawyer (1862) 44 N. H. 198.

[14]Lakeman *v.* Mounstephen, *supra*, footnote 4.

[15]Kimball *v.* Newell, *supra*, footnote 5.

[16]Jones *v.* Thayer (1860) 78 Mass. 443.

Despite the fact that all the events upon which *A's* promise are conditioned have occurred,[17] he may avail himself of certain defenses arising from other circumstances, including the absence of an obligation owing from *B* to *C*. If *C* makes a fraudulent misrepresentation to *A* or a concealment from him concerning any part of the transaction materially affecting *A's* position, *A* will not be bound by an obligation assumed as a result of the fraudulent misrepresentation or concealment.[18] Often the fraudulent misrepresentation or concealment is concerned with *B's* character, past conduct, financial standing or state of indebtedness.[19] But a fraudulent misrepresentation or concealment as to the facts upon which the existence of an obligation between *B* and *C* depends is also sufficient to allow *A* to avoid his contract.[20] That this is sound would seem to be unquestionable, as the non-existence or imperfection of the obligation owing from *B* to *C* greatly increases the likelihood of *A* being called upon to pay. It is in this doctrine of fraudulent concealment that the true explanation is found of those cases which hold that *A* may avoid his obligation if he has entered into it in ignorance of fraud or duress that has been practiced upon *B* by *C*.[21] A mutual mistake of fact as to the existence of an obligation

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[17]*A* may, of course, make a promise upon any condition. Very often *A* makes a conditional promise jointly with *B* or guarantees the performance of a conditional promise by *B*. In either case, it would seem that *C* could not hold *A*, any more than he could *B*, till that condition was performed. Scroggin *v.* Holland (1852) 16 Mo. 419; Stockton, *etc.* Co. *v.* Giddings (1892) 96 Cal. 84, 30 Pac. 1016; Mitchum *v.* Richardson (S. C. 1848) 3 Strobh L. 254. Where the same consideration was given for *A's* promise as for *B's*, a failure of that consideration is a defense for both of them. Duggan *v.* Monk (1908) 5 Ga. App. 206, 62 S. E. 1017; Adams *v.* Cuny (1860) 15 La. 458; Sawyer *v.* Chambers (N. Y. 1864) 43 Barb. 622; *cf.*, Ross *v.* Woodcliff (1814) 18 Va. 324.

[18]As to the effect upon *A's* liability of misrepresentation by *C*, see Brandt, *op. cit.*, § 447; Remington Sewing Machine Co. *v.* Kezartee (1880) 49 Wis. 409, 5 N. W. 809; Ham *v.* Greve (1870) 34 Ind. 18. And as to fraudulent concealment, see Warren *v.* Branch (1879) 15 W. Va. 21; Sooy *v.* State (1877) 39 N. J. L. 135; Bryant *v.* Crosby (1853) 36 Me. 562. Franklin Bank *v.* Cooper (1853) 36 Me. 179, at p. 197, contains a good statement of the doctrine: "To receive a surety known to be acting upon the belief, that there are no unusual circumstances, by which his risk will be materially increased, well knowing that there are such circumstances and having a suitable opportunity to make them known and withholding them, must be regarded as a legal fraud by which the surety will be relieved of his contract."

[19]First Nat'l. Bank *v.* Clark's Estate (1915) 59 Colo. 455, 149 Pac. 612; Sooy *v.* State, *supra*, footnote 18; Blest *v.* Brown (1862) 3 Gif. 450; Railton *v.* Matthews (1844) 10 Cl. & F. 934.

[20]A fraudulent misrepresentation or concealment from *A* of the want of consideration between *C* and *B* has been held a defense to *A*. Hook *v.* White (1901) 201 Pa. 41, 50 Atl. 290; Willis *v.* Willis (1850) 17 Sims. 218; Wile *v.* Wright (1871) 32 Iowa 451; Mendelson *v.* Stout (N. Y. 1874) 5 J. & S. 408; *cf.*, Evans *v.* Keeland (1846) 9 Ala. 42. Similarly, where the creditor fraudulently represented that *B's* forged signature was genuine, *A* was not held. Denton *v.* Morford (1891) 13 Ky. L. R. 94; Klamon *v.* Malvin (1883) 61 Iowa 752, 16 N. W. 356.

[21]See Rowlatt, Principal & Surety, 158. This doctrine has been applied in cases of fraud, Putnam *v.* Schuyler (N. Y. 1875) 4 Hun 166; Waterbury *v.* Andrews (1887) 67 Mich. 281, 34 N. W. 575, and of duress.

owing by *B* might be still another ground which would afford *A* a defense; that is, if both *A* and *C* suppose that *B* has done an act obligating himself, when in fact he has not, *A* should, it seems, have a defense.[22]

There are, no doubt, many other situations which may afford *A* and *B* defenses upon their respective undertakings.[23] But, in view of the foregoing analysis of various typical situations, it would seem clear that a promise which may give *A*, the promisor, the position of a surety is governed by the same rules as any other promise. The mere fact that *B*, the supposed principal, is himself under no obligation is no defense to *A* in a suit upon his promise, and the cases which might give rise to that inference can practically all be explained to on the normal principles of contract law.

EFFECT OF SUBSEQUENT LEGISLATION UPON SPECIFIC PERFORMANCE OF A CONTRACT FOR THE SALE OF REALTY.—Injury to, or destruction of, the subject matter of a sale during the pendency of an executory contract raises the question upon whom the burden of loss shall fall. It is elementary that in ascertaining rights under a contract the courts will look at the intention of the parties, and, unless contravened by some rule of law, such intention will control. But in the absence of any express intention, the courts will resort to presumptions of law. Thus, in the case of a contract for the sale of personalty, various rules of thumb have been developed to aid the court in determining the respective rights of the parties.[1] Similarly, in the case of an agreement to sell realty, recourse must be had to rules of law if there is no express intent as to who shall bear the loss.

It is usually stated that the risk of loss in an executory contract for the sale of land falls upon the vendee because, in equity, he is the

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Hager *v.* Mounts (Ind. 1832) 3 Blackf. 57; Griffith *v.* Sitgreaves (1879) 90 Pa. 187; Patterson *v.* Gibson (1888) 81 Ga. 802, 6 S. E. 840; Graham *v.* Marks (1895) 98 Ga. 67, 25 S. E. 931; Baker *v.* Steele (1915) 61 Pa. Super. Ct. 483.

[22]See Lakeman *v.* Mountstephen (1872) L. R. 7 Q. B. 196, 202; but *cf.*, Jones *v.* Thayer, *supra*, footnote 16.

[23]For instance, if contracts upon certain subjects are void at common law or under statute, it has been held that, since the subject matter of *A's* and *B's* contracts is the same, the obligation of neither may be enforced. Thompson *v.* Lockwood (N. Y. 1818) 15 Johns. 255; United States *v.* Tingey (1831) 30 U. S. 115; see Hawes *v.* Marchant (U. S. 1852) 1 Curtis Cir. Ct. Rep. 136.

[1]For instance, if the contract is made in reference to unspecified goods and there has been no appropriation, title will be presumed not to have passed, and, in case the goods are destroyed, the loss falls upon the vendor. Anderson *v.* Morice (1875) L. R. 10 C. P. 609. Again, where the courts find that the legal title is retained by the seller only for the purpose of security, as in a conditional sale, American Soda Fountain Co. *v.* Vaughn (1903) 69 N. J. L. 582, 55 Atl. 54, or in a shipment, in pursuance of an order, under a bill of lading, Browne *v.* Hare (1858) 3 H. & N. *484; Williston, Sales, § 305, the burden of loss will be thrown upon the vendee for he is the beneficial owner.